THE BRUSSELS I REGULATION AND ARBITRATION

TREVOR C HARTLEY*

Abstract This article considers the effect of the Brussels I Regulation on the arbitration process in EU Member States. The Regulation says that it does not apply to arbitration, but it is unclear exactly what is excluded by this provision. The article first considers this question; it then discusses asset-freezing orders and antisuit injunctions in aid of arbitration and the granting of damages for bringing court proceedings before a court which, in the eyes of the court asked to grant the damages, ought not to hear the case. It finally discusses conflicts between judgments and arbitration awards.

Keywords: antisuit injunctions, arbitration, asset-freezing orders, Brussels I Regulation, conflicts between judgments and awards, damages for wrongful litigation.

Since arbitration is excluded from the scope of both the old (2000) and the new (2012) versions of the Brussels I Regulation,[1] it might be thought that the Regulation could have no impact on it. In fact, this is not the case: there are many important issues concerning their relationship.

I. WHAT IS EXCLUDED?

The first question is: what exactly is excluded from the scope of the Regulation? The relevant provision states simply: 'This Regulation shall not apply to . . . arbitration.'[2] Does this mean merely that proceedings before an arbitrator are outside the scope of the Regulation, or does the exclusion also cover court proceedings relating to arbitration? Does it perhaps go even further

* Professor of Law Emeritus, London School of Economics, t.c.hartley@lse.ac.uk. I would like to thank Dr Jan Kleinheisterkamp, Dr Jacco Bomhoff (both of LSE) and Elisabeth Tretthahn for their help. None of them is responsible for what I have written. There have been a number of studies on this topic; three of the most recent are S Camilleri, 'Recital 12 of the Recast Regulation: A New Hope?' (2013) 62 ICLQ 899; G Möller, 'The Brussels I(a) Regulation and Arbitration' in Patrik Lindskoug *et al*. (eds), *Essays in Honour of Michael Bogdan*, Juristförlaget i Lund (distribution: eddy.se: order@bokorder.se) (2012) 374; L Wilhelmsen, 'European Perspectives on International Commercial Arbitration' (2014) 10 J Priv Int L 113.

[1] The relevant text at the time of writing is Council Regulation (EC) No 44/2001 of 22 December 2000, OJ 2001 L 12, 1 (henceforth 'Brussels 2000'), which was adopted in 2000 and will continue to be applicable until replaced by Regulation (EU) No 1215/2012 of 12 December 2012, OJ 2012 L 351, 1 ('Brussels 2012', also known as 'Brussels I (recast)'). Brussels 2012 applies from 10 January 2015, the date on which it replaces Brussels 2000.

[2] Art 1(2)(d) in both Brussels 2000 and Brussels 2012.

[*ICLQ* vol 63, October 2014 pp 843–866] doi:10.1017/S0020589314000359

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

and cover any court proceedings if the dispute in question is subject to an arbitration agreement?

Since the exclusion applies, in identical terms, not only under Brussels 2000 and Brussels 2012, but also under the forerunner of the Brussels Regulations, the Brussels Convention,[3] it is legitimate to look at the case law under the Convention;[4] it is also legitimate to consider the official reports on it. We start with the reports.

A. Reports on the Brussels Convention

Conventions between the EU Member States on matters within the scope of Union jurisdiction are usually accompanied by an official report explaining the meaning of the convention. These reports are taken into account by the Court of Justice of the European Union (CJEU) when interpreting the convention. The report on the original version of the Brussels Convention was the Jenard Report.[5] This states, first, that the Brussels Convention does not apply to the recognition of arbitration awards;[6] secondly, that it does not apply for the purpose of determining the jurisdiction of courts in respect of litigation relating to arbitration—for example, proceedings to set aside an arbitral award; and, finally, that it does not apply to the recognition of judgments given in such proceedings.[7] This makes clear that the exclusion is not limited to proceedings before arbitrators but also covers court proceedings relating to arbitration.

When the United Kingdom joined the Convention, there was a report by Professor Schlosser on the Convention of Accession.[8] This deals with arbitration in somewhat greater detail.[9] According to Professor Schlosser, two divergent points of view were expressed in the negotiations. The view put forward by the United Kingdom was that the exclusion covers court

[3] The original version of the Brussels Convention was negotiated and concluded by the original six EU (EEC) Member States in 1968: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968. The original text may be found in JO 1972, L 299, 32 (the English version is in OJ 1978, L 304, 77). It came into force for the original Contracting States on 1 February 1973. The United Kingdom became a Party when it joined the EU (EEC) and it came into force in the United Kingdom on 1 January 1987. It was amended a number of times and was replaced by Brussels 2000 when the latter became applicable on 1 March 2002.

[4] This is because the various versions of the Convention and Regulation are regarded as being, in effect, different formulations of the same instrument. For this reason, it is provided that 'continuity' between them must be ensured: Brussels 2000, Recital 19; Brussels 2012, Recital 34. See also *German Graphics Graphische Maschinen*, Case C-292/08, [2009] ECR I-8421, para 27 of the judgment; *Realchemie Nederland v Bayer CropScience*, Case C-406/09, [2011] ECR I-9773, para 38 of the judgment (Grand Chamber).

[5] OJ 1979, C 59, 1.

[6] This follows from the fact that 'judgment' is defined in all the instruments as 'any judgment given by a court or tribunal of a Member State': Brussels Convention, art 25; Brussels 2000, art 32; Brussels 2012, art 2(a).

[7] OJ 1979, C 59, 1 at 13.

[8] OJ 1979, C 59, 71.

[9] ibid at 92–93 (paras 61–65).

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

proceedings concerning any dispute which the parties agreed would be settled by arbitration; the original Member States, on the other hand, maintained that the exclusion covers court proceedings only if they relate to arbitration proceedings.[10] This latter view seems to coincide with that expressed in the Jenard Report. The Schlosser Report does not say which view is correct, though it notes that it was decided not to amend the text of the Convention.[11] This divergence of opinion would make a difference in practice only where different courts take different views as to the validity or applicability of an arbitration agreement: if they both consider it valid and applicable, they would agree that the dispute should be settled by arbitration. In this case, the only court proceedings would be proceedings which, on any view, would be excluded from the scope of the Convention.

Professor Schlosser then proceeds to discuss what he calls 'other proceedings connected with arbitration before national courts'.[12] What he says here is in fact a more detailed statement of the view expressed in the Jenard Report. This was presumably intended to make clear what, in the opinion of all the Member States, was excluded, while leaving open the questions which were controversial.

In these paragraphs, he first says that the Convention in no way restricts the freedom of parties to submit disputes to arbitration.[13] This applies, he says, even to those matters with regard to which the Convention lays down rules of exclusive jurisdiction.[14] On the other hand, he says, this does not prevent national legislation from invalidating arbitration agreements affecting such matters.

He next says (as does Jenard) that the Convention does not cover court proceedings ancillary to arbitration proceedings. He gives the following examples:

- the appointment or dismissal of arbitrators;
- the fixing of the place of arbitration;
- the extension of the time limit for making awards; or
- the obtaining of preliminary rulings on questions of substantive law.

He goes on to say that the Convention also does not apply to court proceedings to determine the validity of an arbitration agreement or, when it is found to be invalid, an order by the court that the parties must not continue the arbitration proceedings.[15]

In his final paragraph on the matter,[16] Professor Schlosser says that the Convention does not apply to court proceedings concerning the

[10] This includes present, past and future arbitration proceedings.
[11] ibid para 61. [12] Paras 63–65. [13] Para 63.
[14] Disputes concerning title to land would constitute an example: see art 16(1) of the Convention (art 22(1) of Brussels 2000; art 24(1) of Brussels 2012).
[15] Para 64. [16] Para 65.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

revocation, amendment, recognition or enforcement of awards, nor does it apply to judgments incorporating awards. He then adds the following sentence:[17]

> If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 [Brussels] Convention is applicable.

This seems to mean that a judgment given after the revocation of the award must be recognized and enforced under the Convention, even if the courts of the Contracting State in which recognition is sought would regard the award (and the arbitration agreement on which it was based) as valid. Since the decision revoking the award (or any decision on the validity of the arbitration agreement) is, in Schlosser's view, outside the scope of the Convention,[18] courts in other Contracting States are entitled to form their own view on the matter: they are not bound by a decision of a court in another Contracting State. This sentence in the Report seems, therefore, to be inconsistent with the British view that the Convention does not apply to court proceedings regarding a dispute which, in the eyes of courts of other Contracting States, is covered by an arbitration agreement.

Reading between the lines, one can perhaps discern the solution supported by the Report: first, the Convention does not apply to a ruling on the validity or applicability of an arbitration agreement; secondly, it does not apply to a decision referring the parties to arbitration or a decision refusing to do so; thirdly, it does not apply to a decision to hear a case despite a claim by one of the parties that it is subject to arbitration. Court proceedings are not, however, excluded from the scope of the Convention merely because, in the view of other courts, they are covered by an arbitration agreement. If a judgment is given in such proceedings, it must be recognized and enforced by courts in other Member States. The recognition and enforcement of arbitration awards, on the other hand, is not covered by the Brussels Convention.

The effect of this is that if there is an agreement providing for arbitration in one Member State (the 'seat') and court proceedings are brought in another Member State (the 'forum'), a ruling on the validity (or applicability) of the arbitration agreement by the courts of the seat will not be binding under the Convention on the courts of the forum: they will not be precluded from hearing the case. On the other hand, a similar ruling by the courts of the forum would not be binding under the Convention on the courts of the seat. Recognition of a judgment on the substance given by the courts of the forum would be covered by the Convention, but the Convention would not apply to the recognition of the award, even if it was incorporated into a judgment.

[17] ibid. [18] This is stated in the last sentence in para 64 and the first sentence of para 65.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

B. The Marc Rich *Case*

The Schlosser Report was published in 1979. More than ten years were to pass before these matters first came before the CJEU. This was in *Marc Rich and Co. v. Società Italiana Impianti*,[19] which concerned a contract for the sale of crude oil, in which the buyer was a Swiss company (Marc Rich) and the seller an Italian company (Impianti). Marc Rich had made an offer to buy the oil and this was accepted by Impianti, subject to additional terms, which were accepted by Marc Rich. Subsequently, Marc Rich sent a telex to Impianti adding an English choice-of-law clause and an English arbitration clause. There was no reply. The oil was shipped, but Marc Rich claimed contamination. Impianti then brought proceedings before a court in Genoa, Italy, for a declaration of non-liability. It argued that the arbitration clause was not part of the contract.

Marc Rich responded by taking steps to commence arbitration proceedings in London. Impianti refused to appoint its arbitrator; so Marc Rich made an application for the High Court to appoint an arbitrator on Impianti's behalf. Impianti claimed that since the Italian court had been seised prior to the English court, the latter was required to stay its proceedings under the *lis pendens* provision of the Convention.[20] This states that where proceedings involving the same cause of action and between the same parties are brought before the courts of different Contracting States, any court other than the court first seised must, of its own motion, stay the proceedings before it.[21] Impianti argued that this provision was applicable because the same question—the validity of the arbitration clause—was in issue in both sets of proceedings.

The English Court of Appeal made a reference to the CJEU, which ruled that the proceedings before the English courts, being ancillary to arbitration proceedings, were outside the scope of the Convention.[22] This was not affected by the fact that the validity of the arbitration agreement was in issue in both sets of proceedings. The CJEU said:[23]

> In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

[19] Case C-190/89, [1991] ECR I-3855. According to Advocate General Damon, this was the first time an English court had made a reference to the CJEU on the interpretation of the Brussels Convention.

[20] Article 21 of the Convention. Equivalent provisions are to be found in Brussels 2000 (art 27) and Brussels 2012 (art 29).

[21] Once the jurisdiction of the court first seised is established, the other court must decline jurisdiction.

[22] Paras 19 and 21 of the judgment. Reference was made to the Schlosser Report.

[23] Para 26 of the judgment.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

The result was that the English proceedings were not barred by the *lis pendens* rule.

The importance of this case lies in the fact that it establishes, as stated in the Jenard and Schlosser Reports, that court proceedings ancillary to arbitration proceedings are outside the scope of the Convention.

The case also establishes that, in determining whether a matter falls within the scope of the Convention, regard must be had solely to the subject-matter ('*objet*', in French) of the proceedings, not to any incidental question raised by either of the parties.[24] If the *objet* of the proceedings is outside the scope of the Convention, the proceedings are not brought within its scope just because an incidental issue relates to a matter within its scope.[25] As we shall see, this rule has been applied in later cases. As we shall also see, however, it is subject to an important qualification.

The proceedings before the CJEU took over two years.[26] During this period, the Italian proceedings were moving forward. Marc Rich filed an objection to the jurisdiction of the Genoa court: it argued that the arbitration clause was part of the contract. This issue was taken on appeal to the highest court in Italy, the *Corte di Cassazione*, which held that the arbitration clause was not part of the contract. This ruling was given approximately six months before the CJEU delivered its judgment. The case then recommenced before the Genoa court. Marc Rich could have walked away from the proceedings; instead, it decided to contest the claim on the substance by lodging pleadings with the Genoa court in May 1991.

When the English proceedings began again after the judgment of the CJEU, Marc Rich asked the High Court in London to issue an antisuit injunction precluding Impianti from taking further steps in the Italian proceedings. This was refused by Hobhouse J on the ground that, by pleading to the merits of the claim before the court in Genoa in May 1991, Marc Rich had submitted to its jurisdiction.[27] This was affirmed by the Court of Appeal, which held that the submission also applied to the ruling by the *Corte di Cassazione* that the arbitration clause was not part of the contract; consequently, Marc Rich was

[24] The '*objet*' of proceedings is the principal claim or remedy sought. This might be an order for the payment of damages, a declaration of non-liability or an order for the appointment of an arbitrator. It is to be distinguished from a preliminary, or incidental, question, which is another issue which must be decided in order to decide the principal claim.

[25] According to the Schlosser Report (above), the question whether an arbitration agreement is valid is itself outside the scope of the Convention. If this is correct—which it certainly is under Brussels 2012—the English proceedings would not have been covered even if their *objet* had been the validity of the arbitration agreement—for example, if the claim had simply been for a declaration on the point.

[26] The order of the Court of Appeal was made on 26 January 1989, but was not received by the CJEU until 31 May 1989. The judgment of the CJEU was delivered on 25 July 1991.

[27] Hobhouse J said that, as a result, Marc Rich would be bound by the judgment of the Genoa court both under the Brussels Convention and under the 'ordinary principles of private international law internationally accepted.'

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

precluded from contesting this point in England.[28] This destroyed the basis of Marc Rich's claim that the English court should appoint an arbitrator on Impianti's behalf.

It is unclear whether the decision of the Court of Appeal was based on the Brussels Convention or on issue estoppel under English law.[29] As will be seen below, there can be no doubt today that a ruling on the validity or applicability of an arbitration agreement is not subject to recognition under the Brussels Regulation; the same was almost certainly true under the Brussels Convention. So the Court of Appeal's judgment was not justified under the Convention; but could it be justified under English law? Although the Convention did not require recognition, it did not preclude it. This is shown by *Bavaria Fluggesellschaft Schwabe v Eurocontrol*,[30] in which the CJEU held that, though a judgment from another Member State which was outside the scope of the Convention was not subject to recognition under the Convention, the Convention did not *preclude* its recognition under an international agreement between the Member States in question. There is no reason why the same should not apply to recognition under Member-State law.

However, if a ruling is to be recognized in England on this basis, *all* issues must be decided under English law, including the jurisdiction of the court of origin: the Regulation has no role to play. This requires consideration of section 32(1) of the Civil Jurisdiction and Judgments Act 1982,[31] a provision which does not apply where recognition is required under the Brussels Regulation.[32] Under section 32(1)(a) of the Act, a foreign judgment will not be recognized in the United Kingdom if the bringing of the foreign proceedings was contrary to an arbitration agreement. However, section 32(1)(a) does not apply where the person against whom the judgment was given submitted to the jurisdiction of the foreign court,[33] though, under section 33 of the Act, he is not be treated as having submitted simply because he contested the jurisdiction of the court, or asked the court to stay the proceedings on the ground that the dispute was subject to an arbitration agreement.[34] He would, however, be regarded as having submitted if he pleaded to the merits.

[28] *Marc Rich & Co. AG v Società Italiana Impianti pA (No 2)* [1992] 1 Lloyd's Rep 624 (CA).

[29] For a later case which clearly was decided under Brussels 2000, see *National Navigation Co. v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; [2010] 2 All ER (Comm) 1243; [2010] 1 Lloyd's Rep 193 (CA).

[30] Cases 9 and 10/77, [1977] ECR 1517.

[31] For general comments on section 32, see *per* Rix LJ in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2011] EWCA Civ 647 (paras 149–151); [2012] 1 WLR 920 at 971–972. The judgment of the Court of Appeal was affirmed by the Supreme Court without detailed consideration of section 32: [2013] UKSC 35; [2013] 1 WLR 1889.

[32] Section 32(4)(a) of the Act (as amended).

[33] Section 32(1)(c). Section 32(3) provides that, in deciding whether to recognize a foreign judgment, a court in the United Kingdom is not bound by a ruling of the foreign court as to any of the matters mentioned in section 32(1) or 32(2). This means that it is not bound by a ruling of the foreign court as to whether there was submission.

[34] This provision is also subject to the Brussels I Regulation: Civil Jurisdiction and Judgments Act, section 33(2) (as amended).

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

This, it will be remembered, is what Marc Rich did in the proceedings before the Genoa court.

C. Asset-Freezing Orders

Does the Regulation apply to asset-freezing orders granted in aid of arbitration? It might be thought that they were ancillary to arbitration and consequently outside the scope of the Regulation. However, they are not quite the same as orders for the appointment of an arbitrator or the other examples given by Schlosser. The latter are part of the arbitration process and the law applicable might reasonably be regarded as part of the law of arbitration. Preliminary measures in support of arbitration are different. Although their function in a given case might be to support arbitration, they can equally well be used to support claims subject to litigation. The applicable law is not part of the law of arbitration: they are independent measures. This is what the CJEU held in *Van Uden v Deco-Line*,[35] a case concerning an interim-payment order,[36] granted as a provisional measure by a Dutch court in support of arbitration. While accepting that court proceedings ancillary to arbitration are outside the scope of the Convention, the CJEU held that the question whether a preliminary measure in support of arbitration falls within the scope of the Convention depends, not on the nature of the measure, but on the nature of the rights it protects.[37] The CJEU said that if the subject-matter (*objet*) of the substantive claim falls within the scope of the Convention, the Convention is applicable to provisional measures granted in support of it, even if the claim is subject to arbitration. Since the claim before the Dutch arbitrators was for breach of contract, the interim-payment order was covered.

This does not mean that provisional measures cannot be granted in aid of arbitration; however, where the defendant is domiciled in another Member State, they must be permitted by the Regulation. The relevant provision today is Article 31 of Brussels 2000 (Article 24 of the Convention),[38] which allows a court without jurisdiction over the substance of a case to grant such provisional, including protective, measures as may be available under its national law. In *Van Uden*, the CJEU said that where the case is subject to arbitration, the courts of no Member State have jurisdiction over the substance; so resort must always be had to this provision. Therefore, asset-freezing orders in aid of arbitration may be granted against a party domiciled in another Member State only in terms of Article 31. Under this, they must be restricted

[35] Case C-391/95, [1998] ECR I-7091.

[36] This is an order, granted (under Dutch law) in summary ('*kort geding*') proceedings, requiring the defendant to pay the claimant part or all of the sum claimed, pending a final decision on the substance. If the final decision goes against the claimant, he must repay the money.

[37] Para 33 of the judgment.

[38] The equivalent provision under Brussels 2012 is art 35.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

to property within the territory of the Member State in which they are made: worldwide orders are not allowed.[39]

II. ANTISUIT INJUNCTIONS

At this point, we must change focus and consider antisuit injunctions, since they are the obvious remedy where a claim regarded by English law as subject to an English arbitration clause is brought before the courts of another country. Antisuit injunctions were invented in England (originally as a weapon used by the courts of equity in their battle with the courts of common law) and, though they have spread to the United States and other common-law jurisdictions, they appear to be used more widely in England than anywhere else.

A. Turner v Grovit

The first case in which antisuit injunctions were considered by the CJEU was *Turner v Grovit,* a case which did not involve arbitration.[40] The basic facts were that an English employee of a company incorporated in Ireland but with its central management in England brought proceedings against the company in England for constructive wrongful dismissal. The constructive dismissal had taken place in Spain, where he had been working temporarily in the office of an associated Spanish company, while still an employee of the English company. After final judgment (in favour of the employee) had been given in the English proceedings, the Spanish company brought proceedings against the employee in Spain. These proceedings were an attempt to relitigate the issues already decided in England.[41] The English Court of Appeal granted an antisuit injunction. The House of Lords made a reference to the CJEU, which held that such injunctions may not be granted to restrain proceedings in another EU State. The UK Government argued that they should at least be permitted in the case of proceedings brought in bad faith, but this was rejected by the CJEU.[42]

The CJEU reached this conclusion as follows: first, it said that the jurisdictional provisions of the Convention may be interpreted with equal authority by the courts of each Contracting State;[43] then it stated that, except in a small number of exceptional cases, the Convention does not permit the

[39] Para 47 of the judgment in *Van Uden*. Although this was said in the context of an interim-payment order, the reasoning behind it would apply equally to an asset-freezing order. This is confirmed by Recital 33 of Brussels 2012; see also *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] EWCA Civ 662; [2007] 2 All ER (Comm) 1093; [2007] 2 Lloyd's Rep 484.

[40] Case C-159/02, [2004] ECR I-3565.

[41] The Spanish claim was for damages for the employee's 'unjustified departure' from the Spanish office and for his bringing a 'baseless' claim in England.

[42] The CJEU said that a determination as to whether the Spanish proceedings were abusive was for the Spanish court, not the English court, to make: para 28 of the judgment.

[43] ibid para 25.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

jurisdiction of a court in one Member State to be reviewed by a court in another Member State.[44] It concluded:[45]

> However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

From this, it will be seen that the objection to antisuit injunctions is that they permit the courts of one Contracting State to impose their views on the courts of another Contracting State regarding the right of the latter to hear a case. They do this by supporting the injunction with the threat of contempt proceedings, which could result in the party concerned being fined, having his assets sequestrated or even being put in prison. As a result, the court in which the foreign proceedings are pending never has the opportunity to decide the matter for itself.

B. West Tankers

Turner v Grovit establishes that the Brussels Regulation prohibits antisuit injunctions directed against proceedings in other EU States. However, that prohibition can apply only within the scope of the Regulation.[46] We therefore come back to the question considered previously: what is the scope of the Regulation with regard to arbitration?

The leading case on this question (with regard to antisuit injunctions) is *West Tankers*.[47] The case arose when a ship belonging to West Tankers hit a jetty in Syracuse, Italy, causing considerable damage. The jetty was owned by Erg, an Italian company. Erg claimed against its insurance company, Allianz, for the damage to the jetty. Allianz compensated Erg up to the limit of the coverage under the policy. Erg then claimed against West Tankers for the remainder of the loss. Since the ship had been on charter to Erg at the time of

[44] ibid 26.

[45] ibid 27.

[46] This seems to follow from the judgment of the CJEU in *Turner v Grovit*, in which it was stated (in para 27 of the judgment) that an antisuit injunction would be 'incompatible with the system of the Convention'. However, in *West Tankers*, the CJEU put the matter slightly differently. It said (in para 29 of the judgment) that an antisuit injunction would be contrary to a 'general principle which emerges from the case-law of the Court on the Brussels Convention'. This could be regarded as an indication of a change in the court's thinking. Perhaps the CJEU will decide in the future that there is a general principle of EU law that Member States must respect the sovereignty of other Member States. If accepted, this principle might preclude antisuit injunctions even outside the scope of the Brussels I Regulation. It should be said that 'general principles' are a recognized source of EU law and have been applied in many situations. For a general discussion, see TC Hartley, *The Foundations of European Union Law* (8th edn, OUP 2014) ch 5.

[47] *Allianz and Generali Assicurazioni Generali v West Tankers*, Case C-185/07, [2009] ECR I-663 (Grand Chamber).

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

the accident, and since the charter party contained an English arbitration clause, Erg began arbitration proceedings against West Tankers in London.

However, because Allianz had partly indemnified Erg, Allianz was subrogated to Erg's rights against West Tankers to the extent to which it (Allianz) had paid Erg.[48] Allianz brought proceedings against West Tankers before a court in Syracuse to recover this amount. It claimed that the court had jurisdiction to hear the case under Article 5(3) of Brussels 2000 (the relevant provision at the time). This confers jurisdiction, with regard to a claim in tort, on the courts for the place where the 'harmful event' occurred. The harmful event had occurred in Syracuse, where the jetty was located.

West Tankers took the view that, since Allianz's right to bring the claim derived from Erg, the claim was subject to the same conditions as applied between it (West Tankers) and Erg. As the arbitration agreement undoubtedly applied as between West Tankers and Erg, West Tankers considered that it also applied as between it (West Tankers) and Allianz. So it contested the jurisdiction of the court in Syracuse; it also brought proceedings before the High Court in London for a declaration that the arbitration agreement covered the claim, and for an antisuit injunction restraining Allianz from pursuing the claim before the court in Syracuse. These were granted by the High Court. Allianz appealed, and the House of Lords made a reference to the CJEU to ascertain whether the prohibition against antisuit injunctions applied when the injunction was granted on the ground that the foreign proceedings were contrary to an arbitration agreement.

This raised the question whether the arbitration exclusion insulated the antisuit injunction from the effects of the rule in *Turner v Grovit*. The argument in favour of this view was that the proceedings in which the injunction was granted were outside the scope of the Regulation. The CJEU agreed that they were;[49] nevertheless, it ruled that the prohibition against antisuit injunctions still applied. After stating that the proceedings in which the antisuit injunction was granted did not come within the scope of the Regulation, the CJEU continued:

> 24 However, even though proceedings do not come within the scope of Regulation No 44/2001 [the Brussels I Regulation], they may nevertheless have consequences which undermine its effectiveness . . . This is so, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
>
> 25 It is therefore appropriate to consider whether the proceedings brought by Allianz . . . against West Tankers before the [court in Syracuse] themselves come within the scope of the Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

[48] This right was based on art 1916 of the Italian Civil Code. There are similar provisions in other legal systems.

[49] para 23 of the judgment.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

> 26 In that regard, the Court[50] finds . . . that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. . . .
>
> 27 It follows that the objection of lack of jurisdiction raised by West Tankers before the [court in Syracuse] on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction . . .
>
> 28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.
>
> 29 It follows . . . that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it . . .

This judgment thus lays down the rule that, in order to determine whether the prohibition against antisuit injunctions applies in a given case, one must consider, not whether the proceedings in which the injunction was granted fall within the scope of the Regulation, but whether the proceedings *against which the injunction is directed* fall within its scope. These were the proceedings in Syracuse.

In order to determine whether the proceedings in Syracuse were within the scope of the Regulation, the CJEU applied the principle, laid down in *Marc Rich v Impianti* (above), that one must look to the subject-matter ('*objet*') of those proceedings. The '*objet*' of the Syracuse proceedings was a claim for damages. This came within the scope of the Regulation; consequently, the preliminary question before the court in Syracuse—the validity and scope of the arbitration clause—also came within the scope of the Regulation.[51] If the '*objet*' of the proceedings falls within the scope of the Regulation, all ancillary questions to be decided in the course of those proceedings also fall within its scope. Consequently, the English courts had no right to grant the injunction.

[50] In the style adopted by the CJEU, 'Court' with a capital 'C' always refers to the CJEU.

[51] This shows that the same question can fall within the scope of the Regulation in one set of proceedings (those in Syracuse) and fall outside its scope in another (those in London).

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

Although this decision met with a hostile reception in England,[52] it is not lacking in legal logic. The reason court proceedings ancillary to arbitration are normally excluded from the scope of the Regulation is that they relate more to arbitration than to civil (court) proceedings, the subject-matter of the Regulation. In the case of an antisuit injunction, however, the position is different. Although the injunction affects arbitration—it protects it from interference—it has an even greater effect on the proceedings against which it is directed, since, if the injunction is obeyed, those proceedings will be stopped in their tracks. For this reason, it makes sense to say that the prohibition against antisuit injunctions applies whenever the proceedings against which the injunction is directed are within the scope of the Regulation.[53]

III. ORDERS BY ARBITRATORS NOT TO LITIGATE

The next topic to consider is the effect of the Brussels Regulation on orders given by arbitrators requiring parties to discontinue court proceedings in another Member State. This question has recently come before the courts of Lithuania.

The Government of Lithuania, acting through its Ministry of Energy ('the Government'), had brought proceedings in Lithuania in connection with energy supplies by Gazprom to Lithuania.[54] Gazprom claimed that the proceedings were contrary to a contract it had concluded, which provided for arbitration in Stockholm. Gazprom commenced proceedings before the arbitrators in Stockholm and an award was made under which it was held that certain aspects of the claims made by the Government before the courts of Lithuania were contrary to the arbitration agreement. The arbitrators ordered the Government to withdraw these claims. Gazprom then applied for recognition and enforcement of the order in Lithuania. This was refused by the Court of Appeal of Lithuania.[55] Gazprom appealed to the Supreme Court of Lithuania, which made a reference to the CJEU.[56]

In the order for reference, the Supreme Court characterized the order in the award as an antisuit injunction and asserted that, by ruling that certain claims before the Lithuanian courts were contrary to the arbitration agreement,

[52] See, for example, A Briggs, 'Fear and Loathing in Syracuse and Luxembourg' [2009] LMCLQ 161; WE Peel, 'Arbitration and Anti-Suit Injunctions in the European Union' (2009) 125 LQR 365.

[53] For subsequent proceedings before the English courts, see *West Tankers v Allianz* [2012] EWCA Civ 27; [2012] 2 All ER (Comm) 113; [2012] 1 Lloyd's Rep 398; *West Tankers v Allianz* (4 April 2012) [2012] EWHC 854 (Comm); [2012] 2 All ER (Comm) 395; [2012] 2 Lloyd's Rep 103. The issues raised in these proceedings will be considered below.

[54] The exact nature of these proceedings is not clear from the order for reference.

[55] The grounds of refusal are not clear from the order for reference, but it is likely that they were based on art V(2)(a) or V(2)(b) of the New York Convention.

[56] *Gazprom v Lithuania*, Case C-536/13 (CJEU, not yet decided). The order for reference was accepted by the CJEU on 27 November 2013.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

the arbitrators were restricting the Lithuanian courts' right to determine for themselves whether they had jurisdiction under Brussels I. In other words, the Supreme Court considered that the rule prohibiting antisuit injunctions was applicable. It asked the CJEU whether the courts of Lithuania had the right to refuse to recognize the award. It will be some time before the CJEU gives a ruling on this question; nevertheless, we can consider what the answer should be.

The vital question is whether it is correct to characterize the order given by the arbitrators as an antisuit injunction. The rule that Brussels I prohibits antisuit injunctions directed against proceedings in other Member States was, as we have seen, first laid down in *Turner v Grovit.* The rationale of the rule (as we have also seen) is that an antisuit injunction prevents a court before which proceedings are brought from determining for itself whether it has jurisdiction to hear them. In *Turner v Grovit*, the CJEU defined an antisuit injunction as 'a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court'.[57] The order in the *Gazprom* case was not backed by a penalty. This goes to the heart of the matter since it is clear from *Turner* that the objection to antisuit injunctions is that they permit the courts of one Member State to impose their views on the courts of another Member State regarding the right of the latter to hear a case. They do this by the threat of contempt proceedings, which could result in the party concerned being fined, having his assets sequestrated or even being put in prison. As a result, the courts where the proceedings are being heard never have the opportunity to decide the matter for themselves. The claimant will discontinue them without further ado.

This rationale does not apply to an order which is not backed by a penalty. If there is no penalty for disobedience, the only way the order can be made effective is for the court against which it is directed to accept it and decline jurisdiction. It was for this reason that Gazprom asked the Lithuanian courts to enforce the order. If Gazprom had gone to the Swedish courts for an order, supported by contempt penalties, precluding the Government from bringing proceedings in the Lithuanian courts, that would have been covered by the ruling in *West Tankers*. If the arbitrators themselves had imposed penalties, that would also have been covered (see below). However, neither of these was the case; so the order was outside the scope of the rule in *Turner* and *West Tankers*.

To extend the scope of the rule to cover an order which is not supported by penalties would be going too far. There are several situations in which a finding that one court has jurisdiction necessarily implies that another court does not have it. If the first court has jurisdiction to determine for itself whether it has jurisdiction, the same must also apply to the second court or to arbitrators. To determine whether they have jurisdiction, arbitrators must decide whether the

[57] Para 27 of the judgment, set out above.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

arbitration agreement is valid and applicable. If they rule that it is, this necessarily means that courts in other Member States do not have jurisdiction. There is no reason why they should not say so. In the Gazprom case, the arbitrators would have failed in their duty to interpret and apply the arbitration agreement if they had not given a ruling as to whether it precluded the proceedings in Lithuania. As long as they do not seek to enforce it by imposing penalties, there can be no objection.

Once it is established that the prohibition against antisuit injunctions is not applicable, it is clear that EU law in general, and the Regulation in particular, have no role to play. Recognition of arbitration awards is outside the scope of the Regulation. This was stated as long ago as 1979 by the Jenard Report,[58] which expressly said that the Brussels Convention did not apply to the recognition of awards.[59] Recognition of awards is a matter for the New York Convention; however, the European Union is not a Party to this and the CJEU has no jurisdiction to interpret it. The Regulation neither requires nor precludes recognition of the award in the Gazprom case. That is a matter for the Lithuanian courts to decide for themselves. The CJEU has no jurisdiction.

IV. BRUSSELS 2012

In 2012, the European Union adopted a recast version of the Brussels Regulation, which applies from 10 January 2015.[60] Arbitration was a major issue in the negotiations. Any hopes that *West Tankers* might be reversed were soon dispelled. One way in which this could have been done would have been to provide that a ruling by the courts of the seat of the arbitration on the validity or applicability of the arbitration agreement would be binding on the courts of other Member States.[61] As applied to *West Tankers*, this would have meant that the courts in Italy would have been obliged to follow a ruling by the English courts that the arbitration clause was applicable as between Allianz and West Tankers. However, the Member States did not adopt such an amendment; instead, more modest changes were made.

[58] OJ 1979, C 59, 1. [59] OJ 1979, C 59, 1 at 13. For Brussels 2012, see Recital 12, para 4.
[60] Brussels 2012, art 81.
[61] Such a provision was proposed by the Commission. The United Kingdom originally tried to obtain a similar result by proposing that the provision excluding arbitration from the scope of the Regulation should be amended to state that it covered court proceedings in respect of which the parties had made an arbitration agreement within art II of the New York Convention, its being implicit in the proposal that the courts of each Member State could decide this question for themselves. If adopted, this would have meant that, in a case such as *West Tankers*, the English courts would not have been obliged to recognize any judgment given by the Italian courts; nor (it seems) would they have been precluded from granting an antisuit injunction, since the proceedings against which the injunction would have been directed would have been outside the scope of the Regulation. However, the proposal did not receive widespread support.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

A. The New York Convention

The exclusion of arbitration was retained in Brussels 2012 without alteration. The only new provision of a substantive nature was Article 73(2), which provides that the Brussels I Regulation does not affect the application of the 1958 New York Convention.

In Brussels 2000, there is no provision referring expressly to the New York Convention; however, Article 71(1)[62] might be regarded as having the same effect. This provides:

> This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

The New York Convention applies with regard to a particular matter: arbitration. It could govern the jurisdiction of courts because it provides that when a court of a Contracting State is seised of an action in respect of which the parties have concluded an arbitration agreement, the court must, at the request of one of the parties, refer the parties to arbitration (unless the arbitration agreement is null and void, inoperative or incapable of being performed).[63] It could also affect the recognition or enforcement of judgments. It requires an arbitral award to be recognized and enforced (subject to exceptions).[64] If the award is irreconcilable with a judgment, this necessarily precludes recognition of the judgment. To this extent, it governs the recognition and enforcement of judgments. The New York Convention could, therefore, come within the terms of Article 71(1), in which case Brussels 2000 would also be subject to it. If this is correct, Article 73(2) of Brussels 2012 does not change the position; nevertheless, it is desirable for the matter to be put beyond doubt.

Since the New York Convention imposes a limit on the application of the Brussels I Regulation, it is necessary to consider how it is interpreted. One obvious difference between the two instruments is that, while the CJEU ensures that the Regulation is interpreted uniformly in all the States in which it applies, there is no equivalent court with regard to the New York Convention: the courts of each Contracting State decide for themselves how it should be interpreted. Although all the EU Member States are Parties to the New York Convention, the Union itself is not a Party; so the CJEU has no jurisdiction to interpret it.[65] Even within the Union, therefore, the courts of each Member State interpret it for themselves.

[62] This provision is retained in Brussels 2012: see Brussels 2012, art 71(1).

[63] New York Convention, art II(3).

[64] ibid, art III.

[65] Art 267(b) of the Treaty on the Functioning of the European Union (TFEU) gives the CJEU jurisdiction, on a reference from a court of a Member State, to interpret acts of an EU institution. In *Haegeman v Belgium*, Case 181/73, [1974] ECR 449, the CJEU held that an international agreement concluded by the Union (then the Community) with one or more non-member States constitutes an act of an EU institution for this purpose. In this way, the CJEU obtained jurisdiction

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

The consequence of this is that an instrument which the courts of each Member State are free to interpret for themselves imposes a limit on the application of an EU measure, the Brussels I Regulation. A somewhat analogous situation arises under the rule that the courts of Member States may refuse to recognize judgments from other Member States on grounds of public policy.[66] Since it is for each Member State to decide for itself what its public policy requires, this also constitutes a limit of uncertain scope on the application of the Brussels I Regulation. However, the CJEU has decided that it has the power to lay down the outer boundaries of Member State jurisdiction in this regard: it is only within those boundaries that the courts of Member States can refuse, on public policy grounds, to recognize a judgment from another Member State.[67] In this way, the CJEU has sought to avoid the establishment of an open-ended escape mechanism from the obligation to recognize judgments under the Regulation. It remains to be seen whether the CJEU will impose a similar limit on the freedom of Member-State courts to interpret the New York Convention in a way which imposes unreasonable restrictions on the application of the Brussels I Regulation.

B. The Recitals

EU regulations normally begin with recitals, which are intended to provide guidance on the interpretation of the substantive provisions. Brussels 2012 contains a large number of recitals, and one of them concerns arbitration. This is Recital 12, which may be regarded as an aid to the interpretation of the provision excluding arbitration from the scope of the Regulation and to the provision that the New York Convention prevails over the Regulation. There are four paragraphs to Recital 12 and we will consider each in turn.

The first paragraph begins by stating that the Regulation does not apply to arbitration. This is expressly stated in Article 1(2)(d); however, by repeating

to interpret such agreements. In *SPI*, Cases 267–9/81, [1983] ECR 801, the CJEU extended its jurisdiction to cover the original GATT, even though the original GATT had not been concluded by the Union (Community). It did this on the ground that the subject matter of the original GATT, tariffs and trade, had since become a matter of exclusive Union (Community) competence. However, this reasoning cannot apply to the New York Convention because arbitration is not an area of exclusive Union competence. If arbitration had been brought within the scope of the Brussels I Regulation—for example, by providing that a judgment of a court of a Member State on the validity or applicability of an arbitration agreement was subject to recognition under the Regulation—that would have weakened the case for saying that the CJEU has no jurisdiction to interpret the New York Convention. It might also have opened the way for the Union to claim treaty-making power in the area: see eg the *Lugano Convention* case, Opinion 1/03, [2006] ECR I-1145.

[66] Recognition must be 'manifestly contrary to public policy in the Member State in which recognition is sought': Brussels 2000, art 34(1); or 'manifestly contrary to public policy (ordre public) in the Member State addressed': Brussels 2012, art 45(1)(a).

[67] *Krombach v Bamberski*, Case C-7/98, [2000] ECR I-1935; *Gambazzi v DaimlerChrysler Canada Inc.*, Case C-394/07, [2009] ECR I-2563.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

it at the beginning of Recital 12, it is made clear that the recital is intended to clarify the interpretation of Article 1(2)(d).

The first paragraph of Recital 12 goes on to state that nothing in the Regulation prevents the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from:

- referring the parties to arbitration,
- staying or dismissing the proceedings, or
- examining whether the arbitration agreement is null and void, inoperative or incapable of being performed.[68]

Recital 12 states that this is to be done according to the national law of the Member State in question, thus making clear that EU law does not apply.

The next paragraph provides that a ruling by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed[69] is not subject to the rules of recognition and enforcement in the Regulation, regardless of whether the court decided it as a principal issue or as an incidental question. Although this provision does not expressly apply to rulings on the applicability of an arbitration agreement,[70] there is little doubt that this too is covered.

The paragraph makes clear that such a ruling does not have to be recognized, regardless of what the *objet* was of the proceedings in which it was granted. It could therefore be regarded as an exception to the rule laid down in the *Marc Rich* case that, for the purpose of determining the scope of the Regulation, incidental questions must be characterized on the basis of the *objet* of the proceedings. Consequently, the court before which substantive proceedings are pending can decide for itself, according to its own law,[71] whether those proceedings are subject to an arbitration agreement; however, its ruling is not binding under the Regulation on the courts of other Member States. The latter can make up their own minds on the issue, according to their own law.

If we take the *Marc Rich* case as an example, the Recital means that a ruling by the Italian courts that the arbitration clause was not part of the contract would not be binding under the Regulation on the English courts; however, a ruling to the opposite effect by the English courts would not be binding under the Regulation on the Italian courts.

The third paragraph of the Recital states that where a court of a Member State, exercising jurisdiction under the Regulation or under

[68] These rules could also be regarded as being derived from the New York Convention.
[69] These are the words of art II(3) of the New York Convention.
[70] This is the question whether an arbitration agreement applies to a given dispute. This can involve deciding whether the dispute comes within the scope of the agreement; it can also involve deciding whether an agreement is binding on third parties, as occurred in the *West Tankers* case.
[71] This will include the New York Convention, as interpreted under its law.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

national law,[72] has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this does not preclude the court's judgment on the substance from being recognized and enforced under the Regulation. This establishes that the view expressed by the United Kingdom at the time of the negotiations for UK adhesion to the Brussels Convention is not correct. Proceedings before a court are not excluded from the scope of the Regulation just because they are, in the view of other Member States, covered by an arbitration agreement. The fact that the court of origin took jurisdiction after deciding that an arbitration agreement was invalid or inapplicable does not disentitle the resulting judgment from recognition and enforcement under the Regulation.

However, the third paragraph provides that this is without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the 1958 New York Convention, which (as we have seen) takes precedence over the Regulation. The effect of this will be considered below.

Finally, the Recital confirms the established view that the Regulation does not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award. Such proceedings are not affected by the Regulation—for example, with regard to jurisdiction and the application of the *lis pendens* rule; it also means that judgments and orders given in such proceedings are not subject to recognition under the Regulation.

The effect of Recital 12 is that the law discussed above continues to apply. This includes the judgments of the CJEU in *Marc Rich* and *West Tankers*. However, the Recital clarifies a number of matters, especially the situation where a court gives a judgment in a dispute which, in the view of a court in another Member State, is subject to an arbitration agreement.

From all this, it will be seen that the policy of the European Union is to establish a reasonable balance between arbitration and litigation as alternative methods of dispute resolution. There is no general policy that arbitration should prevail over litigation, though, by giving precedence to the New York Convention, the Regulation ensures that awards trump judgments in certain circumstances.

Having considered the new Regulation, we can complete our survey by discussing the remaining issues.

[72] The reference to jurisdiction under national law is concerned with the situation in which the jurisdictional rules of the Regulation are inapplicable because the defendant is not domiciled in a Member State. In such a situation, the court would take jurisdiction under its national rules of jurisdiction. Nevertheless, its judgment must still be recognized and enforced under the Regulation. Although the jurisdictional rules of the Regulation are (generally speaking) dependent on domicile, the rules on the recognition and enforcement of judgments are not.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

V. INJUNCTIONS PROHIBITING ARBITRATION

If a court grants an injunction precluding parties from resorting to arbitration, that order would be outside the scope of the Regulation.[73] The proceedings against which it was directed would be outside the scope of the Regulation, since the Regulation does not apply to arbitration. Even if the *objet* of the proceedings in which it was granted was within the scope of the Regulation and, as a result, those proceedings were within the scope of the Regulation, the ruling in *West Tankers* means that the prohibition against antisuit injunctions would not apply. However, the injunction (and any accompanying declaration) would also be outside the scope of the Regulation for recognition purposes: courts in other Member States would not be required by the Regulation to recognize and enforce it. They would be free to make up their own minds. If they considered that the arbitration agreement was valid and applicable, they would no doubt refuse to give effect to the injunction. Since a ruling on the validity and applicability of the arbitration agreement is not itself entitled to recognition under the Regulation,[74] the court in which the arbitration was pending would not be bound by any such ruling. Thus, in *West Tankers*, if the court in Syracuse had given an injunction requiring Allianz not to continue with the arbitration in London, the Regulation would not have required the English courts to give effect to it.

VI. DAMAGES FOR LITIGATING IN THE 'WRONG' COURT

We are now in a position to consider a question raised in the English courts in the *West Tankers* case after the judgment of the CJEU had been given: can arbitrators award damages against a party for bringing court proceedings in another Member State if the arbitrators consider that those proceedings were brought in violation of an arbitration agreement? It will be remembered that in *West Tankers* the English High Court originally granted two remedies, a declaration that the arbitration agreement applied as between Allianz and West Tankers and an antisuit injunction. After the CJEU had ruled that the antisuit injunction was contrary to the Regulation, the House of Lords rescinded it; however, the declaration still stood.

The arbitrators then ruled that West Tankers was under no liability to Allianz. Subsequently, West Tankers asked the arbitrators to award it damages for the loss it had suffered by reason of the fact that Allianz had 'wrongfully' sued it in Syracuse. Such damages would have covered, first, the legal fees and expenses necessarily incurred in defending the Italian proceedings; and, secondly, indemnification against any damages that might be granted by the

[73] Schlosser Report, OJ 1979, C 59, 71, para 64.
[74] Brussels 2012, Recital 12, para 2. This was also accepted under Brussels 2000.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

Syracuse court.[75] The arbitrators held (by a majority) that such an award would be precluded by the decision of the CJEU. West Tankers appealed against this ruling to the High Court under section 69 of the Arbitration Act 1996.

In the High Court, Flaux J held that the arbitrators had been wrong to hold that an award of damages for breach of the arbitration agreement would be contrary to the CJEU judgment.[76] He considered that such an award would be no more than a reflection of the ruling on the substance, namely that West Tankers was under no liability to Allianz.[77]

An award of damages for bringing proceedings in the courts of another Member State in violation of an arbitration agreement necessarily involves a finding that the arbitration agreement was valid and applicable; this in turn involves a finding that the court before which the proceedings were brought had no jurisdiction to hear the case. It was said above that courts and arbitrators in one Member State should be entitled to give a ruling on the validity or applicability of an arbitration agreement. They should even be entitled to rule that the bringing of proceedings in the courts of another Member State is contrary to the arbitration agreement. However, if they go further and support such a ruling by the threat of penalties or damages, they are trespassing on the domain of the courts of the other Member State.[78] They are trying to enforce their view on those courts instead of letting them take the final decision themselves. Imposing damages for suing in the 'wrong' court would prevent the party concerned from even trying to sue in the other Member State. Such a ruling would be an antisuit injunction in all but name.

It is of course true that proceedings before arbitrators and proceedings before courts in an appeal against an award are outside the scope of the Regulation. However, as we have seen, the applicability of the prohibition against antisuit injunctions does not depend on whether the proceedings in which the injunction was granted are within the scope of the Regulation but on whether the proceedings against which it is directed are within the scope of the Regulation. The proceedings before the court in Syracuse were within the scope of the Regulation; so the prohibition against antisuit injunctions (or orders having an equivalent effect) was applicable to the proceedings before

[75] It is not known whether the Italian court ever awarded damages against West Tankers or indeed whether it held that it had jurisdiction.

[76] *West Tankers v Allianz* (4 April 2012) [2012] EWHC 854 (Comm); [2012] 2 All ER (Comm) 395; [2012] 2 Lloyd's Rep 103. According to Westlaw, this judgment was upheld by the Court of Appeal but no details are available. See further *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375 (CA); *CMA CGM SA v Hyundai MIPO Dockyard Co. Ltd* [2008] EWHC 2791 (Comm); [2009] 1 All ER (Comm) 568; [2009] 1 Lloyd's Rep 213.

[77] At paras 55–56.

[78] It is true that the purpose of a penalty is to punish someone for doing something, while the purpose of damages is to compensate another person because he *did* do it; nevertheless, their effect is the same: they deter the person concerned from doing it. This is the important point: the EU rule against antisuit injunctions is a rule with a particular purpose—to stop the courts of one Member State interfering with the activities of the courts of another Member State. For this reason, what matters is the *effect* of the order, not its legal nature. Result-oriented rules are common in EU law; they are also found in English law—for example, in the law governing asset-freezing orders.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

the High Court. It was also applicable to proceedings before the arbitrators. The arbitrators were right in their ruling.

VII. RECOGNITION OF JUDGMENTS AND AWARDS

We finally come to the recognition and enforcement of judgments, on the one hand, and awards, on the other. Since the CJEU has not pronounced on this question, we have to proceed with caution.

We have already seen that the recognition of arbitration awards is outside the scope of the Regulation. Such recognition is governed by the New York Convention. On the other hand, the recognition and enforcement of a judgment cannot be refused on the ground that the courts of the Member State in which recognition is sought consider that the court of origin ought to have referred the parties to arbitration.[79]

From this, it follows that if there is a judgment but no award, the judgment[80] must be recognized and enforced in other Member States.[81] The fact that the courts of the Member State in which recognition is sought consider that the courts of origin took jurisdiction contrary to an arbitration agreement is not a ground for refusing to recognize the judgment. Nor would it make any difference if arbitration proceedings were pending between the parties in the Member State in which recognition was sought. There is no provision in the New York Convention which applies in this situation. Only an unacceptably broad interpretation would lead to the conclusion that it precludes the recognition of a judgment because it might conflict with an award which might be given in the future. Once recognized, the judgment would constitute *res judicata* between the parties and thus put an end to the arbitration proceedings.

If there is an award but no judgment, it would seem equally clear that the Brussels I Regulation would not preclude recognition and enforcement of the award.[82] Once recognized, this too would be binding as between the parties and would put an end to any parallel proceedings in the courts of the Member State in question. However, since it is for the courts of each Party to the New York Convention to interpret the Convention for themselves, the courts of

[79] Brussels 2012, Recital 12, para 3, first sentence. The same is almost certainly true under Brussels 2000.

[80] It is assumed that the judgment is not outside the scope of the Regulation. As we have seen, a judgment on the validity or applicability of an arbitration agreement is not subject to recognition under the Regulation, regardless of whether it was decided as a principal issue or as an incidental question.

[81] A judgment from another Member State must be recognized without any special procedure being required: Brussels 2000, art 33(1); Brussels 2012, art 36(1). Any attempt to delay recognition until after an award had been made would be contrary to the Regulation.

[82] However, the Regulation would not *require* recognition of the award, even if it was incorporated into a judgment. Such a judgment would be outside the scope of the Regulation: Brussels 2012, Recital 12, para 4; Schlosser Report, para 66.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

the latter Member State might decide that one of the exceptions to recognition was applicable.

What if the judgment and award were both given at more or less the same time and neither was invoked in the other proceedings before a final judgment or award was given? In this situation, there would be both a judgment and an award between the same parties which, we assume, are in conflict. We first consider the position in a third Member State, one which is neither that in which the judgment was given, nor that in which the award was made. The courts of that State would be faced with two seemingly conflicting obligations. Under the Brussels I Regulation, they would be required to recognize the judgment and under the New York Convention, they would be required to recognize the award.[83]

When conflicting judgments are given by the courts of different Member States, the solution laid down by the Brussels I Regulation is that third Member States must recognize the earlier judgment.[84] However, this does not apply in the case of an award: since the New York Convention prevails over the Brussels I Regulation, the award must be recognized, even if the judgment was given first.[85] The judgment would not be recognized to the extent that it conflicted with the award.

We now consider the issue from the point of view of the Member State in which the judgment was given. Since the judgment would not have been given in another Member State, the Brussels I Regulation would not apply. The New York Convention would apply and would require recognition of the award unless some ground for non-recognition was applicable. The courts of that Member State would have to interpret the New York Convention and apply it to the facts of the case. This would be a matter for them. No outside authority, not even the CJEU, could intervene.

We finally consider the matter from the point of view of the Member State in which the award was given. Here the New York Convention would not be applicable: it applies only to the recognition of awards made in the territory of a State other than the State where recognition of the award is sought.[86] Does this mean that the Member State in which the award is made must recognize the judgment, rather than the award? It would be most peculiar if this were the case, since it would mean that an award would have greater effect in other States than in the one in which it was given.

Under the Brussels I Regulation, there is a rule that a judgment from another Member State does not have to be recognized if it conflicts with a judgment between the same parties given in the Member State in which recognition

[83] We assume that grounds for non-recognition do not exist under either instrument.

[84] Brussels 2000, art 34(4); Brussels 2012, art 45(1)(d).

[85] This would apply even if the award was not given in a Member State of the European Union, provided it was subject to recognition under the New York Convention.

[86] New York Convention, art I(1). It also applies to awards not considered as domestic awards in the State where recognition is sought: ibid.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press

is sought, even if the latter judgment was given subsequently.[87] This provision could be applicable if the award was incorporated in a judgment or if it had the same status or effect as a judgment under the law of the Member State in which it was given. The decision of the CJEU in *Hoffmann v Krieg*[88] makes clear that this rule applies even if the local judgment concerns a subject-matter outside the scope of the Brussels I Regulation. If applied in the appropriate way, this provision could provide the solution.[89]

VII. CONCLUSIONS

Although some arbitration lawyers felt that the revision of the Brussels I Regulation did not go far enough, the solution finally adopted is probably the best that was possible in the circumstances. Anything more would either have been unacceptable to other Member States or would have entailed undesirable consequences in other respects.

[87] Brussels 2000, art 34(3); Brussels 2012, art 45(1)(c).

[88] Case 145/86, [1988] ECR 645.

[89] In *West Tankers v Allianz* [2012] EWCA Civ 27; [2012] 2 All ER (Comm) 113; [2012] 1 Lloyd's Rep 398 it was held that an English arbitration award could be converted into a judgment under section 66(2) of the Arbitration Act 1996 so that the party in question (West Tankers) could benefit from art 34(3) of Brussels 2000. This was so even though the award was purely declaratory.

https://doi.org/10.1017/S0020589314000359 Published online by Cambridge University Press